A.M.F.M. of Summers County, Inc. *and* United Steelworkers of America, AFL-CIO, CLC. Cases 11–CA-15659 and 11–RC-5949

December 14, 1994

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

The questions presented here are whether the judge correctly found that the Respondent engaged in various actions which violated Section 8(a)(4), (3), and (1) of the Act and interfered with employee free choice in a representation election. The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, A.M.F.M. of Summers County, Inc., Hinton, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that Case 11–RC–5949 is severed from Case 11–CA–15659, the election in Case 11–RC–5949 is set aside, and that Case 11–RC–5949 be remanded to the Regional Director for further proceedings.

[Direction of Second Election omitted from publication.]

Patricia L. Timmins, Esq., for the General Counsel.Larry P. Rothman, Esq. (Smith, Hennan & Althen), of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

PHILIP P. McLEOD, Administrative Law Judge. I heard this case in Hinton, West Virginia, on February 15, 16, and 17, 1994. Pursuant to a Decision and Direction of Election in

Case 11–RC–5949 issued on August 10, 1993,¹ a secret ballot election was held on September 8 among service and maintenance employees, dietary employees, housekeeping employees, certified nurse's assistants, licensed practical nurses, medical records clerk, nursing medical clerks, and activities coordinators employed by Respondent. Among the eligible voters, 39 votes were cast for union representation and 48 votes cast against union representation. Following the election, United Steelworkers of America, AFL–CIO, CLC filed timely objections to conduct affecting the results of the election. Shortly thereafter, on September 27, the Union filed the charge in Case 11–CA–15659.

On October 22, a complaint and notice of hearing issued which alleges, inter alia, that Respondent violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act), by issuing warnings to employees James Gill and Kay Fleshman; by suspending employee evaluations which adversely affected employees' wages and benefits; by granting wage increases to employees to discourage their union activities; by promoting licensed practical nurses to supervisory positions in order to discourage their union activities; and by threatening employees concerning their union activities. On October 25, the Regional Director for Region 11 issued a supplemental decision, order directing hearing and order consolidating cases, joining the two cases for hearing. In its answer to the consolidated complaint, Respondent admitted certain allegations including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, the complaint was amended to allege that Respondent violated Section 8(a)(1) of the Act by telling statutory employees that they were supervisors and thus prohibited from engaging in union activities. Respondent amended its answer to deny that allegation. At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, all parties also filed timely briefs with me which have been considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

A.M.F.M. of Summers County, Inc. is, and has been at all times material herein, a West Virginia corporation engaged in operating a nursing home at Hinton, West Virginia. In the course and conduct of its business operations, Respondent annually purchases and receives goods and products valued in excess of \$50,000 directly from points located outside the State of West Virginia and annually derives gross volume of revenue in excess of \$500,000 in the operation of its nursing home. Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹On July 19, 1994, Administrative Law Judge Phillip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief. The National Labor Relations Board has delegated it authority in this proceeding to a three-member panel.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ All dates herein refer to 1993 unless otherwise specified.

II. LABOR ORGANIZATION

United Steelworkers of America, AFL–CIO, CLC is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

Respondent operates a 120 bed intermediate care nursing facility just outside Hinton, West Virginia. Respondent is one of nine such nursing home facilities owned or operated throughout West Virginia by A.M.F.M., Inc., the parent corporation, headquarted in Charleston, West Virginia.

John Elliot is the president of A.M.F.M., Inc. as well as the president of the Summers facility. Elliot serves as chief executive and chief financial officer and is responsible for the operation of all nine facilities.

During approximately February 1993, employees James Gill and Kay Fleshman contacted the United Mine Workers to discuss the possibility of that union representing Respondent's employees. After several meetings, in April 1993, the employees contacted the Union herein to further pursue representation. Also during April, Director of Nurses Deborah Ashley learned through Clinical Care Coordinator Barbara Meadows, both supervisors within the meaning of the Act, that employees were looking for a union to represent them and meeting with union representatives for that purpose. Ashley admitted that she reported this information immediately to Hinton Administrator Rick Shrewsberry. Shortly thereafter, Gill, Fleshman, and other employees personally informed Ashley of their participation in union activities. Ashley again reported this information to Shrewsberry. In late May, the Union sent Respondent a letter identifying 17 employees who were actively engaging in a union campaign at Respondent's facility.

B. The May 1993 Wage Increase

All employees at all of Respondent's facilities received an across-the-board wage increase in April 1990. Licensed practical nurses (LPNs), received an additional increase in June 1990. In September 1990, all employees again received an across-the-board increase. Nine months later, in March 1991, all employees received another across-the-board increase.

Beginning in March 1992, Human Resource Director Pam Lawson began a wage survey study at all nine of Respondent's facilities to compare them to similar facilities in each area. Administrators of the various facilities supplied Lawson with information at various times between March and August 1992. In early December 1992, Lawson prepared a summary for CEO John Elliot recommending a 3- to 5-percent wage increase. Elliot decided that for financial reasons, he would be unable to grant a wage increase before the end of 1992, and deferred any action until the next year. Elliot, however, included the proposed raise in his budget report to the state regulatory agency for 1993.

In May 1993, after Respondent learned of union activity at the Hinton facility, Respondent implemented a 25-cent-per-hour across-the-board wage increase for all employees at all nine of its facilities. Respondent admits that it knew of the union activities among employees at the Hinton facility when CEO Elliot signed off on the paperwork granting this

raise. Elliot testified that the decision was totally unrelated to the union activities of employees at that one facility. Elliot testified that he had serious concerns about whether the increase recommended by Lawson could be granted simply because of the cash flow demands which it represented. Elliot testified that it was not until after he was able to review the results of operations for the first quarter of 1993 that his "comfort level" was satisfied that "the numbers worked." On or about May 5, the wage increase was announced to all facilities effective May 1.

C. July 1993: The Representation Petition, Promotions, and Raises Granted to LPNs

On July 6, the Union filed its petition in Case 11–RC–5949 seeking to represent employees at the Hinton facility, including licensed practical nurses.

On July 19, the LPNs were informed by letter from CEO John Elliot that they were all being promoted to supervisors. On July 20, Hinton Administrator Rick Shrewsberry met with LPNs and repeated the same message. The LPNs were given a 25-cent-per-hour raise along with this "promotion," supposedly because of additional responsibilities and additional duties which they would be required to perform.

On the next day, July 21, Respondent's attorney herein met with the licensed practical nurses and informed them that in view of their supervisory status, they could not engage in union activity. Employees James Gill and Kay Fleshman both testified credibly that because of the attorney's comments, neither they nor other LPNs campaigned any further on behalf of the Union until after the Regional Director issued his Decision and Direction of Election finding them to be employees within the meaning of the Act, as more fully discussed below.

On July 28, a hearing was conducted by Region 11 of the Board on various issues relating to the representation petition, including the issue of whether or not LPNs were supervisors within the meaning of the Act. At that hearing, employees Gill and Fleshman testified on behalf of the Union concerning the duties and responsibilities of LPNs. On August 17, the Regional Director issued a Decision and Direction of Election wherein he found, inter alia, that Respondent's LPNs are not supervisors and are statutory employees within the meaning of the Act.

It is undisputed that prior to the promotion of LPNs to supervisors, LPNs were never included in regular management meetings held at the Hinton facility. Director of Nurses Deborah Ashley testified candidly she was informed by her superiors that while LPNs were going to be promoted to supervisor, there title would change but they were going to be doing basically the same duties as before, with a few more responsibilities and more accountability for their actions. Despite the would-be promotion, and the raise in pay, the LPNs' duties did not change until at least November when they were given their first training "module" or session.

D. July 31: The Disciplinary Warning to Employee James Gill

On July 27, supervisors attending a department head meeting reported that James Gill had been observed talking about the Union while he and other employees were working. Administrator Shrewsberry admits directing the supervisors to

investigate the matter further and obtain documentation against Gill if possible. At the urging of supervisors, Shrewsberry received written reports from employees concerning statements Gill made to them about the benefits of union representation. Shrewsberry received only one written complaint, from certified nursing assistant Brenda Allen, that Gill's solicitations interfered with her work.

After Gill testified on behalf of the Union at the representation hearing on July 28, on July 31 Gill was issued a disciplinary oral warning, euphemistically referred to as "educational counseling," by Director of Nursing Deborah Ashley. It is undisputed that Shrewsberry specifically directed Ashley to issue this warning to Gill. At Shrewsberry's direction, Ashley met with Gill on July 31, documented the meeting sometime later, and presented a memo of the meeting to Gill on August 14.

By the time of the trial herein, Ashley had been terminated as director of nursing, and she was called as a witness by counsel for General Counsel. Ashley testified that while she was director of nursing, after Respondent became aware that employees were engaged in union activities, she was instructed by CEO Elliot to find some basis and issue warnings to both Gill and employee Kay Fleshman. Ashley testified that she would not have given warnings to either Gill or Fleshman had she not been instructed to do so. Respondent argues that Ashley should not be credited since she had obvious reasons for being biased against Respondent. While there may indeed be reasons why Ashley might be biased against Respondent, I am utterly convinced from having observed her as a witness that Ashley was telling the truth, particularly relating to the warnings issued to employees Gill and Fleshman. Ashley was a very credible witness, candidly admitting, for example, her own shortcomings which led to her termination. As it relates to the warnings issued to Gill and Fleshman, I note that Ashley's testimony is also supported by other evidence.

The disciplinary warning issued to Gill was for allegedly soliciting on behalf of the Union in violation of Respondent's no-solicitation rule. Of particular interest in Gill's case, however, is the testimony of Brenda Allen that it was she who started the conversation with Gill about the Union. Allen did not receive any discipline or warning for her conduct. Moreover, Allen's testimony tends to corroborate Ashley who admitted to having "steered" the contents of the written documentation of the conversation in order to "get something" on Gill. Ashley, for example, specifically told Allen to state whether the conversation between her and Gill kept Allen from doing her job. Allen admitted that while it was she who started the conversation with Gill, after being approached and talked to about the conversation by Ashley, Allen stated in a memo documenting the conversation that Gill "started talking about the Union," that she was against the Union and "didn't want to hear about it," and that Gill "kept me away from my work and put me behind with my patient." At the trial herein, Allen testified candidly that it was she who started the conversation with Gill which kept her from completing her work. As both Allen and Ashley intimated, Ashley intentionally steered Allen toward blaming Gill for the conversation and any interference which it might have caused with employees' work.

On July 31, Director of Nursing Deborah Ashley met with Gill and informed him that he was being given an oral warning or reprimand for soliciting on behalf of the Union in violation of Respondent's no-solicitation rule. During the meeting between Ashley and Gill, Ashley reminded Gill once again that he could not engage in union activities on behalf of the Union because he was a supervisor. Ashley then read Gill Respondent's no-solicitation rule and warned Gill that he had to abide by it. Ashley also told Gill that he had been accused of interfering with employees' work by talking about the Union. Gill responded that he and other employees had routinely sold nonunion related items at the facility in the past without incident. This is corroborated by other witnesses. Further, Respondent has no rule against talking during working time, and there is simply no evidence that Gill actually solicited Allen to do anything on behalf of the Union. Gill simply responded to Allen's inquiry about the Union. The record clearly reflects that Respondent, through Ashley, encouraged Allen to point the finger at Gill in order to justify Respondent issuing discipline to Gill, and I so find.

E. August 6: Disciplinary Warning Issued to Employee Kay Fleshman

On August 6, Director of Nursing Ashley issued a verbal warning to employee Kay Fleshman. As was the case with Gill, Administrator Shrewsberry directed Ashley to issue the warning to Fleshman. Shrewsberry decided that Fleshman needed this warning because of an allegedly hostile attitude displayed toward Shrewsberry by not saying "good morning" to Shrewsberry and not speaking to Shrewsberry when he entered Fleshman's work area, by not wearing the company name tag, and by speaking up in a critical manner concerning company rules during employee meetings.

There is no question that at some point in the past, some employee or employees have been issued discipline for displaying poor work attitudes. On the other hand, Director of Nursing Ashley testified in an entirely credible manner that the specific conduct for which Fleshman was issued the warning was no different from conduct other employees engaged in for as long as Ashley worked at the facility and for which no discipline had issued. Ashley testified credibly that after the union campaign began, she was told by administrator Shrewsberry both privately and in supervisors' meetings that Ashley needed to "clean house" and crack down by finding reasons to issue discipline to union supporters. When Fleshman did not do so, Shrewsberry finally directed Ashley to issue specific discipline to the two most avid union supporters, James Gill and Kay Fleshman. I find that this is precisely what Ashley did.

F. August 23: The Actions of Dr. Jack Woodrum

On or about August 23 or 24, not long before the Board-conducted election on September 8, employee James Gill was called to the nurses' desk by medical director Dr. Jack Woodrum. Gill testified credibly that Clinical Care Coordinator Barbara Meadows and Social Service Director Ray Nutter were also present. Gill testified that Dr. Woodrum asked Gill why he was trying to get a union to represent Respondent's employees. Dr. Woodrum went on to state that if the Summers County facility became unionized, CEO Elliot would sacrifice that facility and close it in order to save the other facilities from becoming union.

Woodrum was called as a witness by Respondent, and he denied making these or similar remarks to Gill, but I found Woodrum's denial half-hearted and totally unconvincing.

Gill also testified credibly that as Dr. Woodrum made this statement to Gill, neither Clinical Care Coordinator Meadows nor Social Service Director Nutter, both admitted supervisors, said or did anything to disclaim Woodrum's statements. I credit Gill that Dr. Woodrum made the statements to which Gill testified. I find as well that Clinical Care Coordinator Barbara Meadows and Social Service Director Ray Nutter were both present during Woodum's remarks and did nothing to disclaim Woodrum's statements.

G. September 1993: Suspending Employee Evaluations

In the Board-conducted election held on September 8, 39 votes were cast for union representation and 48 votes were cast against representation. On September 13, the Union filed timely objections to conduct affecting the results of the election. It is undisputed that after the Union filed objections to the election, Administrator Shrewsberry delayed completion of annual employee evaluations and merit pay adjustments.

Director of Nurses Deborah Ashley testified credibly she was told by administrator Shrewsberry that the freeze was being imposed because of "allegations that were filed by the Union." Shrewsberry went on to tell Ashley that Respondent "didn't want to give any raises during this timespan where it could be misinterpreted as bribes or whatever." Respondent told employees the reason employee performance evaluations were frozen was due to the Union's objections to the election. Employees were given no indication how long the "freeze" might last, although Respondent did tell employees that eventually the wage increases would be reinstated and they would be retroactive.

There is no dispute that annual employee performance evaluations were the basis on which employees received regular wage increases. There is no dispute that after the Board-conducted election and after the Union filed objections, Respondent imposed a temporary freeze on evaluations and on raises stemming from such evaluations. Neither is there any dispute that when the wage increases were eventually granted, they were in fact made retroactive to their originally scheduled date, which was the first full payroll period after their employment anniversary date. Nine employees had their evaluations indefinitely suspended pursuant to Shrewsberry's action.

Analysis and Conclusions

The Supreme Court has stated that when a wage increase is granted by an employer during a union organizing campaign, it will presume that the raise was given in order to dissuade employees from supporting the Union. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). The Court stated that when a raise is granted in such situations, the burden is on the Employer to overcome that presumption and prove that the increase was granted for other legitimate business considerations. The Board, however, recently declined to invoke such a presumption, apparently choosing instead a test which would require that the preponderance of the evidence must reflect unlawful motivation. *Speco Corp.*, 298 NLRB 439 fn. 2 (1990). See also *Montgomery Ward & Co.*, 288 NLRB 126 fn. 6 (1988). The Board will give considerable

weight to the employer's application of the wage increase to other employees who are not involved in the Union's organizing effort. *J. J. Newberry Co.*, 249 NLRB 991, 1008–1009 (1980). Similarly, the relative size of a wage increase compared to the employer's past practice is a relevant consideration. *Automated Products*, 242 NLRB 424 (1979).

Respondent admits that when it granted the wage increase to employees in May 1993, it knew of union activities among employees at the Hinton facility. The timing of this raise is the one element to which counsel for General Counsel can most strongly point as evidence of unlawful motivation. Other factors, however, strongly suggest that the May 1993 wage increase would have occurred at or about the same time regardless of employee union activity. All employees at all of Respondent's facilities received an acrossthe-board wage increase in April 1990 and again in March 1991. These raises suggest a pattern of Respondent reviewing employee wage levels and granting raises when possible on an annual basis in the spring. Indeed, the record reflects that beginning in March 1992, Human Resource Director Pam Lawson began another wage survey study at all of Respondent's facilities. Although Lawson recommended that employees receive a wage increase, CEO John Elliot decided that for financial reasons, particularly cash-flow concerns, he would not grant such an increase before the end of 1992. Elliot, however, included such as proposed raise for calendar year 1993 in his budget report to the West Virginia health care regulatory agency. When Elliot did implement the raise in May 1993, he did so at all of Respondent's facilities. The 1993 raise was instituted in the spring, as were raises in 1990 and 1991. Based on all of these facts, I am persuaded that the raise granted Respondent in May 1993 would have occurred without regard to union activity at the Hinton facility, and I shall therefore dismiss the allegation that the May 1993 raise was granted in violation of the Act.

I reach a much different result, however, with regard to the July 1993 promotions and raises granted to LPNs. On July 6, 1993, the Union filed its petition in Case 11–RC–5949 seeking to represent employees at the Hinton facility, including LPNs. On July 19, the LPNs were informed by letter from CEO John Elliot that they were all being promoted to supervisors. On July 20, Hinton Administrator Rick Shrewsberry met with the LPNs and repeated the same message. The LPNs were given an additional 25-cent-per-hour raise along with this promotion. On the next day, July 21, Respondent's attorney met with the LPNs and informed them that in view of their supervisory status, they could not engage in union activity.

It is true, as Respondent argues, that as far back as March 1991 Elliot formulated as one of his "management by objective" goals the inclusion of LPNs in the corporate management team. The record herein reflects, however, that until the Union filed its petition seeking to represent licensed practical nurses, Respondent had done very little, if anything, to implement that goal. Indeed, in 1991 and thereafter Elliot decided instead to focus on several other objectives, including new job descriptions, health insurance coverage for employees, a new human resources policy and procedure manual, and a new employee handbook. Indeed, throughout 1992 and 1993, Respondent pursued a much different goal of obtaining approval from the State of West Virginia to be a provider of continuing education credits for nurses within the State of

West Virginia as required of nurses by recently enacted continuing education legislation.

It was not until after union activity began among employees at the Hinton facility that Respondent took any action to actually implement the goal of making LPNs supervisors. In its posttrial brief, Respondent argues that "the Company has always taken the position that LPNs are supervisors." Nothing is farther from the truth. In fact, the record is absolutely clear that prior to the July 1993 promotion of LPNs to supervisors, LPNs were never included in regular management meetings held at the various facilities.

As soon as union activity began at the Hinton facility, however, Respondent immediately began to implement this goal. This was easy to do since some LPNs exercised quasimanagement authority when they acted as charge nurses on the evening and nighttime shifts. Respondent simply had to formalize those quasi-supervisory duties and delegate them to every LPN as LPNs related to certified nursing assistants. This is why, within a time frame of 3 days from July 19 to July 21, Respondent was able to inform LPNs that they were all being promoted to supervisors, issue them an immediate raise, and then have Respondent's attorney declare that in view of their supervisory status, LPNs could not engage in union activity. Even after Respondent took this action, nothing was done to actually train LPNs to be "supervisors" for almost 4 months until the first training "module" in November. I find that Respondent promoted LPNs to supervisors and issued them a raise simply in order to wrest away from LPNs the right under the Act to engage in union activity. In short, Respondent's action was simply part of a scheme to deprive employees of Section 7 rights guaranteed them by the Act, and I find that in doing so Respondent violated Section 8(a)(1) of the Act. Regency Manor Nursing Home, 275 NLRB 1261 (1985).

Moreover, I find that as a part of the scheme to deprive employees of their statutory rights, Respondent's attorney met with and informed LPNs that in view of their supervisory status, they could not engage in union activity. Respondent's attorney was simply acting in concert with Respondent to attempt to chill the exercise of Section 7 rights by licensed practical nurses, and I find that by doing so he violated Section 8(a)(1) of the Act. Shelby Memorial Home, 305 NLRB 910 fn. 2 (1991).

Finally, Respondent would no doubt argue that even if it acted to promote LPNs to supervisors because of union activity among employees at the Hinton facility, LPNs would eventually have been promoted to supervisors anyway as reflected by the "management by objective" goals. While it is true that Respondent had long been discussing the "charge nurse as manager" concept, and probably even intended to implement it somewhere down the line, when that might have occurred were it not for the union activity is a matter of pure speculation.

I also find that Respondent issued disciplinary warnings to employees James Gill and Kay Fleshman in retaliation for their union activity, and in retaliation for having testified on behalf of the Union at the Board's representation case hearing. Former Director of Nurses Deborah Ashley testified credibly that after Respondent became aware employees were engaged in union activities, she was encouraged by CEO John Elliot to find some basis to issue warnings to both Gill and Fleshman. When Ashley did not do this on her own, she

was eventually specifically directed by Hinton Administrator Rick Shrewsberry to issue warnings to Gill and Fleshman. Ashley testified credibly that she would not have given warnings to either Gill or Fleshman had she not been instructed to do so.

With regard to the warning issued to Gill, credible record testimony reflects that it was not Gill, but employee Brenda Allen, who initiated the conversation regarding the Union. Ashley steered Allen toward laying the blame for this conversation on Gill. I note, too, that Respondent has no rule against talking during working time, and there is simply no evidence that Gill actually solicited Allen to do anything on behalf of the Union. Gill simply responded to Allen's inquiry about the Union. Respondent, however, through Ashley, encouraged Allen to point the finger at Gill in order to justify Respondent issuing discipline to Gill. With regard to the warning issued to employee Kay Fleshman, Ashley testified credibly that the conduct which displayed Fleshman's alleged poor attitude was in fact no different from the conduct other employees engaged in for as long as Ashley worked at the facility and for which no discipline had ever been issued. I find that Respondent issued disciplinary warnings to both Gill and Fleshman in order to retaliate against them for their union activity and for having testified on behalf of the Union at the Board-conducted representation case hearing, and Respondent thereby violated Section 8(a)(1), (3), and (4) of the Act.

As I have found above, in late August 1993, not long before the Board-conducted election on September 8, Medical Director Dr. Jack Woodrum, accompanied by Clinical Care Coordinator Barbara Meadows and Social Service Director Ray Nutter, confronted employee James Gill at the nurses' desk. Dr. Woodrum first asked Gill why he was trying to get a union to represent Respondent's employees. Dr. Woodrum then went on to state that if the Hinton facility became unionized, corporate CEO John Elliot would sacrifice that facility and close it in order to save the other facilities from becoming union. Counsel for General Counsel argues that Dr. Woodrum's duties as medical director at the Hinton facility make him an agent of Respondent within the meaning of Section 2(2) and (13) of the Act. Respondent denies that Woodrum is its agent for any purposes. The facts regarding Woodrum's duties and responsibilities as medical director are not disputed. Woodrum has been the medical director at the facility for as long as the facility has existed. In this capacity, he has served on various committees and advised Respondent on matters which have arisen relative to both medical care and nursing care. He reviews all of Respondent's policies and procedures, and his signature approving them is on the front page of Respondent's policy and procedures manual, including its human resources manual. Woodrum's name is prominently displayed on the wall at the front of Respondent's facility along with the facility administrator, director of nurses, and department heads.

On the other hand, the record is equally clear that Woodrum has no authority in personnel matters and plays no role in hiring, firing, interviewing, disciplining, evaluating, or directing the work of employees. Woodrum does not participate in regular management meetings. When Woodrum is in the facility as medical director, he is accompanied by a member of Respondent's management staff, usually the clinical care coordinator. Woodrum has no authority, and does

not on any regular basis deal directly with employees about personnel matters or policies. In the health care industry, the Board has recognized that individuals such as physicians whose authority extends only to the direction of medical treatment pursuant to the exercise of medical judgment are not supervisors or agents in the meaning of the Act where their actions are incident only to patient care. See, e.g., Middletown Hospital Assn., 282 NLRB 541, 548 (1986). Woodrum's position as medical director, however, tends to cloak him with more authority than simple direction of medical treatment, as exemplified by the fact that Woodrum's signature appears on the front page of all of its policies and procedures manuals, including its human resource manual. Whether or not Woodrum's duties and responsibilities as medical director make him an agent of Respondent within the meaning of the Act is nevertheless somewhat questionable. I find it unnecessary to reach that specific issue. When employee James Gill was summoned to the nurses' desk and confronted by Dr. Woodrum on this occasion in late August 1993, Woodrum was accompanied by clinical Care Coordinator Meadows and Social Service Director Nutter, both admitted supervisors and agents of Respondent within the meaning of the Act. As Woodrum confronted Gill, arguing that if the Hinton facility became unionized corporate CEO John Elliot would sacrifice that facility and close it in order to save the other facilities from becoming union, neither Meadows nor Nutter said or did anything to disclaim Woodrum's statement. In the context of that confrontation, employee Gill had every reason to believe that Woodrum was speaking on behalf of, or with special insight and knowledge of Respondent. In other words, given Woodrum's special status as medical director of the facility, and with two of Respondents admitted supervisors present throughout the conversation, both remaining silent and never contradicting or correcting Woodrum's statement, employee Gill had every reason to believe that Woodrum was speaking on behalf of Respondent and/or that his comments were being ratified and condoned by the two supervisors present. Accordingly, I find that in the context of this conversation, Woodrum's threats that Respondent would close the Hinton facility if employees selected the Union are attributable to Respondent, and Respondent thereby violated Section 8(a)(1) of the Act.

There is no dispute that after the Board-conducted election and after the Union filed objections, Respondent imposed a temporary freeze on annual performance evaluations and on raises stemming from such evaluations. Neither is there any dispute that when the wage increases were eventually granted, they were in fact made retroactive to their originally scheduled date. Nine employees had evaluations and raises delayed pursuant to Respondent's temporary freeze. As I have found above, Respondent told employees that the reason employee performance evaluations were being frozen was do to the Union's objections to the election. In other words, Respondent tried to blame the Union for the fact that evaluations and raises were being delayed.

Respondent nevertheless argues that since wage increases were eventually granted retroactive to their originally scheduled date, no discrimination and therefore no unfair labor practice occurred. I reject Respondent's argument. The adverse effect of Respondent's actions on employees was in delaying, making them wait for both evaluations and merit raises. Respondent itself clearly understood how this ad-

versely affected and inconvenienced employees, for Respondent attempted to lay the blame for that on the Union. I therefore find that by suspending or "freezing" the evaluation and annual raises of employees in retaliation for the Union filing objections to the Board-conducted election, Respondent thereby violated Section 8(a)(1) and (3) of the Act. Shelby Memorial Homes, supra; Sunbeam Corp., 287 NLRB 996 fn. 4 (1988). The decision in KMST-TV, Channel 46, 302 NLRB 381 (1991), is clearly distinguishable. In that case, the employer similarly delayed evaluations and raises, but made it clear to employees that the purpose of the postponement was to avoid the appearance of influencing the election's outcome. In this case, however, Respondent specifically blamed the Union for the freeze in evaluations and raises by telling them that the Union's objections to the election were the reason that the evaluation and raises would be delayed.

CONCLUSIONS OF LAW

- 1. Respondent, A.M.F.M. of Summers County, Inc. is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. United Steelworkers of America, AFL-CIO, CLC is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.
- 3. The raise granted by Respondent to employees in May 1993 was not to dissuade employees from supporting the Union and would have occurred without regard to union activity, and that allegation is hereby dismissed.
- 4. Respondent promoted licensed practical nurses to supervisors and granted them a raise in order to prevent and/or discourage them from exercising the right to engage in union activity, and Respondent thereby violated Section 8(a)(1) of the Act.
- 5. As part of a scheme to deprive employees of their rights under the Act, and/or to discourage employees from exercising such rights, Respondent's attorney met with and informed licensed practical nurses that in view of their supervisory status, they could not engage in union activity, and Respondent thereby violated Section 8(a)(1) of the Act.
- 6. Respondent issued disciplinary warnings to employee James Gill and Kay Fleshman in retaliation for their union activity, and in retaliation for having testified on behalf of the Union at a Board hearing, and Respondent thereby violated Section 8(a)(1), (3), and (4) of the Act.
- 7. Through Dr. Jack Woodrum, acting in concert with Clinical Care Coordinator Barbara Meadows and Social Service Director Ray Nutter, Respondent threatened employees that if the Hinton facility became unionized, Respondent would sacrifice that facility and close it in order to save the other facilities from becoming union, and Respondent thereby violated Section 8(a)(1) of the Act.
- 8. Respondent suspended and temporarily froze employee performance evaluations, and raises resulting from such evaluations, in retaliation for the Union filing objections to the Board-conducted election, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.
- 9. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow

of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall also recommend that because of the unfair labor practices which I have found to have occurred between the filing of the petition and the Board-conducted election in Case 11–RC–5949, the Union's objection to the election be sustained and the election held on September 8, 1993, be set aside and a second election be conducted by secret ballot among employees in the appropriate unit at such time and manner as the Regional Director deems appropriate.

Accordingly, on the foregoing findings of fact and conclusions of law, I issue the following recommended²

ORDER

The Respondent, A.M.F.M. of Summers County, Inc., Hinton, West Virginia, its officers, agents, successors, and assigns shall

- 1. Cease and desist from
- (a) Promoting licensed practical nurses to supervisors and granting them raises in order to prevent and/or discourage them from exercising the right to engage in union activity.
- (b) Informing licensed practical nurses that in view of their supervisory status, they are not entitled or permitted to engage in union activity.
- (c) Issuing disciplinary warnings to employees in retaliation for their union activity and/or in retaliation for testifying at a Board-conducted hearing.
- (d) Threatening employees that if the Hinton, West Virginia facility became unionized, Respondent would sacrifice that facility and close it in order to save the other facilities from becoming union.
- (e) Suspending and/or temporarily freezing employee performance evaluations, and raises resulting from such evaluations, in retaliation for the Union filing objections to a Board-conducted election.
- (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Remove from its files any documentation of, and any reference to, the disciplinary warnings issued to employees James Gill and Kay Fleshman, and notify them in writing that this has been done, and that evidence of the unlawful warnings will not be used as a basis for future personnel actions against them.

- (b) Post at its facility in Hinton, West Virginia, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.
- ³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid and protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT promote licensed practical nurses to supervisors and grant them raises in order to prevent and/or discourage them from exercising the right to engage in union activity.

WE WILL NOT inform licensed practical nurses that in view of their supervisory status, they are not entitled or permitted to engage in union activity.

WE WILL NOT issue disciplinary warnings to employees in retaliation for their union activity and/or in retaliation for testifying at a Board-conducted hearing.

WE WILL NOT threaten employees that if the Hinton, West Virginia facility became unionized, Respondent would sacrifice that facility and close it in order to save the other facilities from becoming union.

WE WILL NOT suspend and/or temporarily freeze employee performance evaluations, and raises resulting from such evaluations, in retaliation for the Union filing objections to a Board-conducted election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL remove from our files any documentation of, and any reference to, the disciplinary warnings issued to employ-

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ees James Gill and Kay Fleshman, and notify them in writing that this has been done, and that evidence of the unlawful warnings will not be used as a basis for future personnel actions against them.

A.M.F.M. OF SUMMERS COUNTY, INC.